(11)

No. 91-1010

IN THE

Supreme Court of the United States

October Term, 1991

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,
Petitioner,

v.

METCALF & EDDY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether the denial of a claim of Eleventh Amendment immunity asserted by a Puerto Rican public corporation can be effectively reviewed on appeal from final judgment?

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BRIEF OF RESPONDENT

Respondent, Metcalf & Eddy, Inc. ("M&E"), requests that this Court affirm the First Circuit's decision in *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 945 F.2d 10 (1st Cir. 1991). Petitioner, an autonomous Puerto Rican public corporation, sought dismissal in the district court on the ground that it was entitled to Eleventh Amendment immunity. The district court denied the motion. The First Circuit properly refused to hear an interlocutory appeal from this ruling,

holding that Petitioner's claim could be effectively reviewed on appeal from final judgment. The First Circuit's decision should be affirmed and this case remanded to the district court for trial.[1]

STATEMENT OF THE CASE

I

PARTIES TO THIS CASE

The Puerto Rico Aqueduct and Sewer Authority ("PRASA") is a public corporation, separately incorporated under Puerto Rican law. It supervises and oversees the distribution and treatment of water and wastewater in Puerto Rico. C.A. App. 5. By statute, PRASA's financial obligations are not debts of the Commonwealth of Puerto Rico. P.R. Laws Ann. tit. 22, § 144 (1988); *see also* C.A. App. 65 (prospectus representing that PRASA bonds are not debts of the Commonwealth). PRASA is "autonomous" and has "complete control and supervision of its properties and activities." P. R. Laws Ann. tit. 22, §§ 142, 144(j) (1988). It must pay its debts out of its own funds and set its rates and charges so as to fund, with a safety margin, the maintenance, repair, and

1 Discovery is substantially completed, motions for summary judgment have been filed, and the case is virtually ready for trial.

operation of its water and wastewater systems. P. R. Laws Ann. tit. 22, §§ 144, 158. It is prohibited from pledging the credit or the taxing power of the Commonwealth. *Id.*, § 144. PRASA may borrow money, issue revenue bonds, enter into contracts, and sue and be sued in its corporate name. *Id.*, § 144 (c), (d), and (g).

The courts of the Commonwealth of Puerto Rico have consistently treated PRASA as a private enterprise.[2] The Supreme Court of Puerto Rico has concluded that PRASA was "unquestionably framed as a private enterprise or business and in fact operates as such." *A.A.A. v. Union de Empleados A.A.A.*, 105 P.R. Dec. 437, 456-57, 5 O.T. 602, 628 (1976). After considering the statutory provisions that created PRASA, the Commonwealth's Supreme Court found that PRASA "enjoys an extraordinary fiscal and administrative autonomy. Its structure, as well as its powers and authorities, are basically similar to those of a private enterprise." 105 P.R. Dec. at 456, 5 O.T. at 627. The Commonwealth's Supreme Court held that an "overwhelming combination of factors [lead] to the

2 Similarly, the First Circuit has twice suggested that PRASA is not an arm of the Commonwealth. *See* Pet. App. A-12 ("substantial doubt" that PRASA is an arm of the State); *Paul N. Howard Co. v. Puerto Rico Aqueduct & Sewer Auth.*, 744 F.2d 880, 886 (1st Cir. 1984) (expressing "doubt that PRASA is sufficiently an arm of the state to qualify for the protection of the Eleventh Amendment"), *cert. denied*, 469 U.S. 1191 (1985).

conclusion that [PRASA] operates as a private enterprise or business." 105 P.R. Dec. at 457, 5 O.T. at 629; *see also Canchani v. C.R.U.V.*, 105 P.R. Dec. 352, 356-57, 5 O.T. 485, 489-90 (1976) (PRASA has "judicial personality *independent* of the Commonwealth of Puerto Rico") (emphasis in original); *Arraiza v. Reyes*, 70 P.R.R. 583, 586-87 (1949) (reviewing evidence of PRASA's autonomy and concluding "the Legislature clearly indicated its intention to the effect that this authority would be as amenable to judicial process as any private enterprise would be under like circumstances").

M&E is a corporation[3] internationally renowned for its expertise in wastewater treatment services. C.A. App. 4-5. It has provided such services to various federal, state, and private entities, as well as to public corporations operating as private enterprises, such as PRASA. *Id.* 5.

II.

BACKGROUND TO THIS CASE

The relationship between M&E and PRASA arose out of an enforcement action brought against PRASA by the United States Environmental Protection Agency ("EPA").

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3 M&E's list of parent companies pursuant to Supreme Court Rule 29.1 was included in its Brief in Opposition to the petition for a writ of certiorari at 2 n.1.

In 1985, the EPA suit culminated in a Consent Order (modified in 1988) that, among other things, required substantial improvements to PRASA's eighty-three existing wastewater treatment plants and restricted additional sewage connections to thirty-eight of these plants. C.A. App. 6-7.

PRASA and M&E executed a contract in March 1986 under which M&E agreed to provide project management services for the Consent Order's rehabilitation work. *Id.* 9. M&E immediately began providing those services to PRASA and, over the succeeding several years, met all deadlines established in the Consent Order. *Id.* 10-12.

III.

PROCEDURAL HISTORY OF THIS CASE

In September 1990, after PRASA had failed to pay over $37 million due under the contract, principally for monies advanced by M&E to outside contractors and others on PRASA's behalf, M&E commenced this lawsuit in the United States District Court for the District of Puerto Rico.

M&E fully performed its obligations under the contract. PRASA has claimed no defects in M&E's workmanship, in the equipment supplied by M&E, or in the workmanship of Puerto Rican subcontractors hired and paid directly by M&E. Rather than face the

overwhelming merits of M&E's claims, and left with only technical defenses, PRASA has, in the words of the First Circuit, "mounted a furious campaign to avoid joining issue." Pet. App. A–2.[4]

PRASA did not assert any Eleventh Amendment claims immediately after suit was filed. Indeed, for almost six months, PRASA made no objection to the federal court's exercise of judicial power and, apparently forgetting that it viewed itself to be an "arm of the State," made no claim that the Eleventh Amendment precluded federal court authority over the early aspects of this suit.[5] Instead, PRASA itself invoked the federal court's authority by moving to dismiss on the sole substantive ground that M&E had failed to join an indispensable

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4 Petitioner may have a preference for the Commonwealth courts and proceedings which are conducted in Spanish, see Pet. Br. at 5 n.6, but the reasons it states are, at best, disingenuous and, at worst, highly misleading. All of PRASA's witnesses are, in fact, bilingual in English and Spanish (only a handful requested a translator for their depositions), all of M&E's witnesses are English speakers, the contract at issue is in English, the underlying EPA Consent Order is in English, and the bulk of the deposition exhibits and other documents to be used at trial as exhibits are in English. Frankly stated, the only reason for Petitioner's preference for the Commonwealth courts is its hope that local prejudice against M&E will lessen the chance of a loss on the merits.

5 Not surprisingly, PRASA has not been represented by the Attorney General of the Commonwealth of Puerto Rico at any stage of the proceedings in this case.

party. After full briefing by both parties and a hearing before the Court, the district court denied that motion.

In February 1991, PRASA moved for reconsideration of its indispensable party motion. In the same pleading, filed months after the lawsuit was initiated, PRASA first raised its claim that the action should be dismissed on the ground that it was immune from suit under the Eleventh Amendment. Both PRASA and M&E submitted affidavits and documents regarding the merits of PRASA's Eleventh Amendment claim. *Id.* 37-140, 162-65. The district court denied PRASA's motion for reconsideration and dismissal, noting PRASA's "ability to raise funds for payment of its contractual obligations which do not affect the Commonwealth's funds." Pet. App. A-9.

In June, 1991, PRASA appealed from the denial of its motion to dismiss on the ground of Eleventh Amendment immunity. Shortly thereafter, it requested a stay of the district court proceedings until the appeal was decided. On June 28, 1991, the First Circuit denied PRASA's application for a stay, ruling that PRASA had demonstrated neither a probability of success on the merits nor a threat of irreparable injury and that there was "substantial doubt" that "PRASA is sufficiently an arm of the state to qualify for the protection of the Eleventh

Amendment." *Id.* A-12 (quoting *Paul N. Howard Co. v. Puerto Rico Aqueduct & Sewer Auth.*, 744 F.2d 880, 886 (1st Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985)).[6]

After its motion for a stay was denied, PRASA engaged in substantial discovery. Between August and November, 1991, PRASA served several sets of written discovery and required M&E to produce more than one million documents. From October 1991 through February 1992, PRASA took twenty-eight depositions of M&E's current and former employees in more than half a dozen different cities across the country.

IV.

THE OPINION BELOW

The First Circuit refused to consider PRASA's interlocutory appeal. Relying on its prior opinion in *Libby v. Marshall*, 833 F.2d 402 (1st Cir. 1987), the First Circuit applied the collateral order doctrine set forth in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), and concluded that the interlocutory order at issue could be effectively reviewed on appeal from a final judgment. *See Libby*, 833 F.2d at 403-04.

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6 Unlike the other public corporations referred to by Petitioner, see Pet. Br. at 2-3 and n.3, PRASA has never been held to be entitled to immunity under the Eleventh Amendment.

SUMMARY OF ARGUMENT

Petitioner's and *amici's* assertion of the right of States not to be subject at all to the federal judicial power rests upon sweeping notions of federalism and the States' failure to surrender their full sovereignty upon joining the Union. The instant assertion of that right appears entirely too broad in light of this Court's interpretation and application of the core principle of the Eleventh Amendment -- a right to be immune from liability. Moreover, Petitioner's expansive rationale surely does not apply to the exceptionally narrow issue presented by this case: whether an autonomous public corporation created by an entity other than a State has a right not to stand trial at all before a federal court.

Neither the notions of sovereign immunity invoked by Petitioner and *amici* nor the "plan of the Convention" to which they repair contemplate the States authorizing business entities to operate as autonomous public corporations. The Eleventh Amendment does not apply to local park, library or school boards, or even to municipal or county political subdivisions, and it is surely not offended by denying extraordinary interlocutory review to autonomous public corporations.

Moreover, Petitioner's sovereignty and federalism arguments do not apply to entities, like Puerto Rico, which are not States and which owe their existence (and sovereignty, if any) solely to Congress. Eleventh Amendment immunity is available by its terms only to "one of the United States," and this Court has never held that any territory or possession falls within the Amendment's scope. None of the several Congressional enactments relating to Puerto Rico, or to territories or possessions generally, extends the Eleventh Amendment to Puerto Rico. Puerto Rico is a creature of the federal government, subject to Congressional prerogatives, and a suit in federal court against such an entity does not raise any federalism concerns. Only Congress may restrict the jurisdiction which Article III otherwise confers on the lower federal courts. If the judicial power of Article III is to be restricted, it should only be done by explicit Congressional action, and not be inferred by this Court from general pronouncements.

This case can be decided without reaching any of these issues, however, for Petitioner has waived any right not to be tried in federal court. By initially asking the federal court to dismiss this case on grounds other than the Eleventh Amendment, PRASA unconditionally invoked the judicial power of the United States. It has thus waived

any claim that it is immune from suit altogether, and must await appellate review of its Eleventh Amendment claim following entry of a final judgment by the court below.

ARGUMENT

INTERLOCUTORY APPELLATE REVIEW IS NEITHER NECESSARY NOR APPROPRIATE

Piecemeal review is strongly disfavored. Appeals may be taken only from "final decisions of the district courts." 28 U.S.C. § 1291 (1988). A party generally cannot appeal until a district court decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945).

This Court has recognized a narrow exception to § 1291 in the collateral order doctrine. Under this doctrine, interlocutory appeal is allowed for that "small class" of prejudgment orders that conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and are "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *see also*

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

An order is "effectively unreviewable" only where it "involves 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'" *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (quoting *United States v. MacDonald*, 435 U.S. 850, 860 (1978)). The order must be such that unless it is reviewed on an interlocutory basis, "it never can be reviewed at all." *Stack v. Boyle*, 342 U.S. 1, 12 (1952) (opinion of Jackson, J.). The prejudgment order in this case does not meet this test.

1. The Eleventh Amendment Does Not Create a Right Not to Be Tried; It Grants Immunity from Liability, Not Immunity from Suit.

A right not to be tried in the sense relevant to the *Cohen* exception requires "an explicit statutory or constitutional guarantee that trial will not occur." *Midland Asphalt*, 489 U.S. at 801 (emphasis added).[7] Such

[7] Petitioner recites this language but fails to apply it. *Cf.* Pet. Br. at 19-22. Some *amici* totally disregard this language and tell the Court to consider "the way that the right is commonly understood." Br. of the Council of State Govt's, *et al.*, at 15. Petitioner's and *amici's* apparent trepidation in dealing with *Midland Asphalt* is understandable, because the Eleventh Amendment does not provide the explicit guarantee that is required.

a guarantee exists in the Constitution's Double Jeopardy Clause, *Abney v. United States*, 431 U.S. 651 (1977), and in the Speech or Debate Clause, *Helstoski v. Meanor*, 442 U.S. 500 (1979), both of which explicitly foreclose any possibility of trial. *See* Double Jeopardy Clause, U.S. Const. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"); Speech or Debate Clause, U.S. Const. art. I, § 6 ("for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place").

The Eleventh Amendment contains no explicit guarantee against trial. Petitioner's invocation of an alleged right not to be tried rests on a "word game" that this Court has soundly rejected. *Midland Asphalt*, 489 U.S. at 801 ("In one sense, any legal rule can be said to give rise to a 'right not to be tried' if failure to observe it requires the trial court to dismiss . . ."); *see also Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988) (meritorious claim for dismissal is not necessarily a right not to be tried).

The Eleventh Amendment provides immunity against liability, but it does not grant a comprehensive immunity against suit. This Court has recognized that, in an action for money damages like this one, the fundamental Eleventh Amendment interest at stake is

the prohibition on the use of State funds to satisfy a judgment. That core interest has been forcefully enunciated in the decisions of this Court. *E.g., Hafer v. Melo*, 112 S. Ct. 358, 364 (1991) (quoting *Edelmann v. Jordan*, 415 U.S. 651, 663 (1974)) ("a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment"); *Quern v. Jordan*, 440 U.S. 332, 337, 346-47 (1979) (question framed as whether order at issue "constitute[s] permissible prospective relief or a 'retroactive award which requires the payment of funds from the state treasury'"); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 464 (1945) ("when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest"); *see also Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944).[8]

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[8] The Eleventh Amendment is not, in theory or in practice, a prohibition of all trials, or even all liability, involving States, State officials, or State agencies. *See Hafer*, 112 S. Ct. at 364 (Eleventh Amendment does not provide an absolute "shield" or "barrier" to suit against state officials). A State effectively stands trial whenever a case is brought under *Ex Parte Young*, 209 U.S. 123 (1908), against a state official in his official capacity to remedy a violation of federal law. *See Libby*, 833 F.2d at 406. While Petitioner blithely pretends that *Ex Parte Young* means nothing, *cf.* Pet. Br. at 23, that decision has subjected States, their agencies, and their officials to considerable litigation burdens. Given these burdens, the Eleventh Amendment cannot accurately be viewed as a categorical entitlement not to stand trial at all.

That central protection has been given additional force by the courts of appeals. To determine whether entities are arms of States protected by the Eleventh Amendment, the courts of appeals focus most heavily on whether State funds will be used to satisfy a judgment. *See, e.g., Ainsworth Aristocrat Int'l Pty., Ltd. v. Tourism Co. of Puerto Rico*, 818 F.2d 1034, 1037 (1st Cir. 1987) ("the most important [factor] is whether . . . the payment of the judgment will have to be made out of the state treasury"); *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 (9th Cir. 1991) ("the source from which the sums sought by plaintiff must come is the most important single factor in determining whether the Eleventh Amendment bars federal jurisdiction") (citations omitted); *see also, Jacintoport Corp. v. Greater Baton Rouge Port Comm'n*, 762 F.2d 435, 440-41 (5th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 304 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985); *Blake v. Kline*, 612 F.2d 718, 723 (3d Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). As the entity raising an Eleventh Amendment defense appears less and less like a State, the applicability of the Amendment becomes less and less certain. To determine these defenses, district

courts must consider factors that often will not even be amenable to consideration until discovery (and in some cases, a trial) is completed.

The principal protection of the Eleventh Amendment -- immunity from liability -- can be adequately vindicated on appeal from a final judgment.[9] Indeed, because the Amendment operates like a jurisdictional provision, this Court has said that an "Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." *Edelmann v. Jordan*, 415 U.S. 651, 678 (1974). *See also Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.18 (1982); *Green v. Mansour*, 474 U.S. 64, 68, 71 (1985) (referring to the Eleventh Amendment limitation on the Art. III power of the federal courts); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (Eleventh Amendment demonstrates that "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III").

Jurisdictional defenses, contrary to *amici's* suggestion, *cf.* Br. of Council of State Gov'ts, *et al.*, at 13-14, do not typically receive procedural preeminence, but almost

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9 In exceptional cases, often at a party's request, district courts may certify the issue under 28 U.S.C. § 1292(b) (1988), a potential avenue of relief not pursued by Petitioner in this case.

invariably must await vindication until after final judgment. *See, e.g., Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989) (forum selection clause); *Catlin*, 324 U.S. at 236 (denials of motions to dismiss based on jurisdictional grounds are not immediately appealable). Like a claim that a federal court lacks subject matter jurisdiction under Article III, a claim that a federal court lacks jurisdiction based upon the Eleventh Amendment can always be reviewed on appeal.

Under the analysis of PRASA and *amici*, even a patently insubstantial claim of "immunity" would give a defendant, however far from being an arm or alter ego of a State, the right to disrupt proceedings by demanding interlocutory review. Neither *Mitchell v. Forsyth*, 472 U.S. 511 (1985), nor *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), upon which PRASA and *amici* rely, goes so far. *Nixon* involved a matter of singular importance, the scope of presidential immunity, that is not relevant here. *Mitchell* involved a claim, the assertion of qualified immunity, that raises concerns not presented by an Eleventh Amendment defense. The qualified immunity doctrine grants immunity from suit because pernicious consequences attend lawsuits against individuals. Such lawsuits inhibit officials in the exercise of their discretion, disrupt them in the performance of their duties, and deter

others from entering public service. It was these factors that led the Court to allow interlocutory review of denials of claims of qualified immunity.[10] These consequences do not occur in suits against States or arms of States and do not counsel the same result for a claim of Eleventh Amendment immunity. *See Hafer*, 112 S. Ct. at 365 (concern that imposing liability on state officers could hamper their performance of public duties is "properly addressed within the framework of our personal immunity jurisprudence" and not the Eleventh Amendment).

2. PRASA Has Waived Any Claim of Immunity from Suit.

Even if the Eleventh Amendment gives Petitioner a right to be immune from suit in federal courts, PRASA

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10 Contrary to Petitioner's claim, *cf.* Pet. Br. at 21, the First Circuit carefully analyzed both the nature of the claimed defense of qualified immunity and the reasons it should be the subject of immediate interlocutory review. Moreover, the predominant reason for the qualified immunity defense is emphatically not to protect those individuals from litigation costs. *Cf. id.* This Court has always "declined to find the costs associated with unnecessary litigation to be enough to warrant allowing the immediate appeal of a pretrial order." *Lauro Lines S.R.L.*, 490 U.S. at 499. Petitioner's reliance upon litigation costs to justify immediate appeal is thus unavailing.

has waived that right.[11] The analysis presented by both Petitioner and *amici* suggests that the Eleventh Amendment provides two distinct rights: a right to avoid trial and a right not to be subject to a federal court judgment. Pet. Br. at 18; Br. of the Council of State Gov'ts, *et al.*, at 18. By moving to dismiss for failure to join an indispensable party before moving to dismiss on Eleventh Amendment grounds, Petitioner has waived any claim to the former right.[12]

Petitioner itself contends that the alleged immunity from suit encompasses a right not to be subject to the exercise of a federal court's authority "beyond what is necessary to decide the immunity question itself." Pet. Br. at 18. Assuming arguendo that this is a correct view of Eleventh Amendment immunity, such a right would bar the federal court from considering or deciding any matters not directly relating to the Eleventh Amendment. A

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11 This Court may consider this question, even though it was not raised below, because the issue of PRASA's waiver of its alleged immunity from suit may be decided on the basis of the record developed below. Moreover, PRASA's waiver is simply an additional basis for affirming the judgment of the First Circuit. *See Schweiker v. Hogan*, 457 U.S. 569, 585 n.24. (1982).

12 That PRASA initially moved to dismiss on the sole ground of failure to join an indispensable party was noted in the Brief in Opposition at 5. Petitioner has not waived its right to raise its Eleventh Amendment claim of immunity from liability on appeal from a final judgment. Respondent has stipulated that Petitioner has preserved that right. *See* Br. in Opp. at 12 n.6.

waiver of this right would thus occur whenever a defendant seeks or consents to the federal court's exercise of its authority with respect to matters beyond that necessary to decide the immunity question. *Cf. Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) (waiver by state statute or state constitutional provision exists where there is "an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment").

Petitioner here not only consented to the federal court's exercise of such authority, it affirmatively invoked that authority itself, unqualifiedly, months before making any assertion of Eleventh Amendment immunity. On October 26, 1990, PRASA filed a Motion to Dismiss the Complaint for failure to join an indispensable party, submitting in support of its motion two memoranda, exhibits, and a lengthy affidavit.[13] In so moving, PRASA requested that the court exercise jurisdiction that is wholly inconsistent with its claimed immunity from suit. It was only after the federal court exercised its Article III power at PRASA's behest, considered PRASA's own lengthy

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13 While its indispensable party motion was pending, and before it filed its Eleventh Amendment motion, PRASA also produced documents in discovery and certain of its employees for oral depositions.

submissions, held a hearing on PRASA's motion, and issued a ruling on the merits thereof, that PRASA decided to claim that the federal judicial power could not be exercised over this suit at all. PRASA has thus waived its alleged right not be tried.

3. No Justification Exists for Interlocutory Review of The Eleventh Amendment Claims of Autonomous Public Corporations.

The Eleventh Amendment does not extend to counties, municipalities, and other political subdivisions. These entities, while territorially part of a State, are corporations created by the State with such powers as are given them by the State. They are "part of the State only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the State." *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890); *see also Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (local school board created by State law operates more like county or city than arm of the State and is not entitled to Eleventh Amendment immunity). That such corporations are subject to federal jurisdiction notwithstanding the Eleventh Amendment the Court has found "beyond question." *Luning*, 133 U.S. at 530.

Petitioner and *amici* rely upon broad notions of federalism that, they assert, derive from preexisting notions of sovereign immunity only partially surrendered by the States in the "plan of the Convention." These grand invocations of sovereignty, however, pale significantly when it is not the State itself that is called to answer in federal court. Indeed, when the defendant is neither the State nor even one of its branches or departments, but merely an autonomous public corporation authorized to operate in that business form by the State, any remnant federalism concerns of the sort invoked here by Petitioner and *amici* are far too attenuated to be given credence. If true political subdivisions like counties and municipalities, which directly perform the governmental powers of the State at the regional or local level, may properly be denied Eleventh Amendment immunity, *see Luning*, 133 U.S. at 530, that Amendment is in no meaningful sense offended merely by making the Eleventh Amendment claim of a public corporation wait until the entry of final judgment before being given appellate review. There is no compelling reason why such corporations, which mimic private enterprises, should be allowed extraordinary interlocutory review. Rather, like private litigants with jurisdictional defenses, autonomous public corporations

must have their defenses determined on appeal from final judgment.

Indeed, this Court long ago intimated that public corporations, much like counties, municipalities, and political subdivisions, are not shielded by Eleventh Amendment immunity. *Hopkins v. Clemson Agricultural College of South Carolina*, 221 U.S. 636, 645 (1911) (dictum) ("[N]either public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the State alone by virtue of its sovereignty."). PRASA, a public corporation completely responsible for its own finances, has a less colorable claim to being an arm of the State than did the Mt. Healthy school board,[14] which received a "significant amount of money from the State." *Mt. Healthy Bd. of Educ.*, 429 U.S. at 280. There is nothing in the Eleventh Amendment that is offended by denying immediate interlocutory appellate review in these circumstances.

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[14] The merits of Petitioner's claim of Eleventh Amendment immunity are not presented by the petition for certiorari. Respondent agrees with Petitioner and *amici* that any issues other than appealability must be remanded to the First Circuit for resolution. *See* Pet. Br. at 28; Br. of the Council of State Govt's, *et al.*, at 6 n.4.

4. The Eleventh Amendment Does Not Apply to Puerto Rico.

The Eleventh Amendment does not apply to Puerto Rico.[15] The Court has commented that the government established in Puerto Rico in 1900 probably comes within "the general rule exempting a government sovereign in its attributes from being sued without its consent," *Puerto Rico v. Rosaly y Castillo*, 227 U.S. 270, 273 (1913), but it has not extended Eleventh Amendment protection to Puerto Rico. *Rosaly y Castillo* did not consider that issue.[16]

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15 The First Circuit Court of Appeals passed on this question, expressly ruling that Puerto Rico is entitled to Eleventh Amendment immunity, even though Respondent did not raise this issue in the courts below. Pet. App. A-2 n.1. In such a circumstance, particularly where the issue presents an important constitutional question, this Court may decide the matter. *See Virginia Bankshares v. Sandberg*, 111 S. Ct. 2749, 2761 n.8 (1991); *Stevens v. Dep't of Treasury*, 111 S. Ct. 1562 (1991). Puerto Rico's entitlement to Eleventh Amendment immunity is, after all, purely a question of law. It has been briefed by *amici*, *see* Br. of the Council of State Govt's, *et al.*, at 25-26, and is fairly subsumed in the questions presented in the petition for certiorari. It was, moreover, noted in the Brief in Opposition. Br. in Opp. at 14. Such an issue is subject to this Court's review. *See Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 111 S. Ct. 905 (1991).

16 *Rosaly y Castillo* was decided without full briefing or argument, as the appellee made no appearance in this Court. The Court itself cast substantial doubt upon the validity of the dictum in *Rosaly y Castillo* in later cases. *E.g., Porto Rico v. Ramos*, 232 U.S. 627, 632 (1914) ("In placing our decision upon the consent of Porto Rico to be made a party defendant under the circumstances presented by this case, we do not wish to imply that Porto Rico could not have been made a party without its consent . . . As to that we express no opinion.") (emphasis added); *see also Richardson v. Fajardo Sugar Co.*, 241 U.S. 44, 47 (1916) ("Whatever might have been the merit of [appellant's claim of sovereign immunity] we hold . . . that having . . . appeared and taken the other steps above narrated, [appellant] could not thereafter deny the court's jurisdiction") (citations omitted) (emphasis added). The Court thereafter reflexively stated that Puerto Rico could not be sued without its consent, *e.g., Bonet v. Yabucoa Sugar Co.*, 306 U.S. 505, 506 (1939); *Puerto Rico v. Shell Co.*, 302 U.S. 253, 262 (1937), but the issue has never been fully examined by the Court.

By its terms, the Eleventh Amendment affords protection only to "one of the United States." U.S. Const. amend. XI. The Court has stringently applied that language. It has refused to extend the Amendment's protection to political subdivisions such as counties and municipalities or to multi-state agencies, even though such entities exercise a "slice of state power." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400-01 (1979); *Mt. Healthy Bd. of Educ.*, 429 U.S. at 280; *Luning*, 133 U.S. at 530. The straightforward application of this language leads to the conclusion that territories and possessions such as Puerto Rico are not States and do not enjoy Eleventh Amendment protection.

The distinction between States on the one hand, and territories and possessions on the other, permeates the Constitution. While States are free to enact legislation subject only to Constitutional constraints, United States territories and possessions are part of the federal government, subject to Congressional regulation and

control. Territories and possessions, particularly those acquired as spoils of war that were not intended to be incorporated into the union of States, did not have the choice of surrendering a piece of their sovereignty as a price of joining the union. Their sovereignty was unconditionally surrendered along with their territory, and they may exercise only those attributes of sovereignty that Congress expressly allows.

Congressional power over territories and possessions is plenary. The Constitution's Territorial Clause gives Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3. It has long been established that the Constitution does not operate in unincorporated territories or possessions by its own force, except for certain fundamental personal rights. *See Balzac v. Porto Rico*, 258 U.S. 298, 305, 312-13 (1922). An affirmative act of Congress is needed to apply specific constitutional provisions to these territories or possessions. *Id.* Thus, unless there is some explicit indication of Congressional intent to extend the Eleventh Amendment's protection to Puerto Rico, or to territories and possessions generally, there is no justification for importing additional meaning into the

limited language of the Amendment.[17] *See Lake Country Estates*, 440 U.S. at 401 (declining to extend Amendment to bi-state agency where there was no evidence of State or Congressional intent to do so).

There is no indication of Congressional intent to extend the Eleventh Amendment to Puerto Rico. Congress set forth specific constitutional provisions applicable to Puerto Rico, *see, e.g.*, Organic Act of 1917, 39 Stat. 951, 951-52 (1917) ("Jones Act"); Amendments to Organic Act, 61 Stat. 770, 770-71 (1947), in language virtually identical to that in the U.S. Constitution, but the Eleventh Amendment is not among them. Nothing in the Foraker Act enacted by Congress in 1900, Ch. 191, § 1, 31 Stat. 77 (1900), affords Eleventh Amendment protection to Puerto Rico.[18] Nothing in the Organic Act of 1917, 39

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[17] The lower federal courts, in considering claims of Eleventh Amendment immunity made by territories other than Puerto Rico, have always considered Congressional intent to be of paramount importance. After analyzing such intent, these courts have held that the Eleventh Amendment is not applicable to territories. *E.g., Saban v. Dep't of Finance of Northern Mariana Islands*, 856 F.2d 1317 (9th Cir. 1988); *Fleming v. Dep't of Public Safety*, 837 F.2d 401 (9th Cir. 1988) (Northern Mariana Islands); *Tonder v. M/V The Burkholder*, 630 F. Supp. 691 (D.V.I. 1986) (Virgin Islands); *Sakamoto v. Duty Free Shoppers Ltd.*, 613 F. Supp. 381 (D. Guam 1983) (Guam).

[18] The Foraker Act, if anything, suggests that Puerto Rico would be subject to suit regardless of the Eleventh Amendment. Section 7 established "a body politic under the name of The People of Porto Rico with governmental powers as hereinafter conferred and with power to sue and be sued as such." 31 Stat. at 79. Although *Rosaly y*

Stat. 951, does so. Nothing in the Puerto Rican Federal Relations Act, 48 U.S.C. § 731 *et seq.* (1950), does so. The Act applicable to territories generally does not even discuss the Eleventh Amendment. 48 U.S.C. §§ 1451-1492 (1982). This silence is significant because other constitutional provisions have explicitly been made applicable to various territories. *E.g.*, 48 U.S.C. § 1561 (1982) (various constitutional provisions applicable to Virgin Islands).

This Court has acknowledged that Congress may treat Puerto Rico differently from States. *Harris v. Rosario*, 446 U.S. 651, 652 (1980) (per curiam); *Califano v. Torres*, 435 U.S. 1 (1978) (per curiam); *see generally Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 674 (1945) (Congress is not subject to the same constitutional limitations when legislating for territories as when it is legislating for States). Although this Court has found some constitutional provisions applicable to Puerto Rico and

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Castillo interpreted this language to apply only where "consent [was] duly given," 227 U.S. at 277, the full implications of leaping from this statement to the conclusion that Puerto Rico is entitled to Eleventh Amendment immunity would be extraordinary. It would essentially strip federal courts of the power to exercise federal jurisdiction over entities that exist and are regulated solely at Congress' behest, without any indication that Congress intended such a significant curtailment of Article III power.

has declined to apply others to Puerto Rico,[19] the Court has never extended all Constitutional provisions to Puerto Rico, because of the "need to preserve Congress' ability to govern . . . possessions." *Torres*, 442 U.S. at 470. Where the Court has applied relevant constitutional provisions to cases arising in Puerto Rico, it has done so where personal rights were at stake or where there were indications of Congressional intent to extend such rights to residents of Puerto Rico. *See Torres*, 442 U.S. at 469-71.

These considerations are irrelevant to the applicability of the Eleventh Amendment. That Amendment, and the federalism concerns which gave it birth, simply do not speak to the relationship between the federal government and its own territories and possessions. The inherent affront to a State, argued to arise when it is sued in a federal court, does not exist here because Puerto Rico as a legal entity is a creature of the federal government.

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[19] *E.g.*, *Balzac*, 258 U.S. at 306 (Sixth Amendment's guarantee of grand and petit juries and Seventh Amendment's right to trial by jury do not apply); *Downes v. Bidwell*, 182 U.S. 244 (1901) (Constitutional requirement that all taxes and duties imposed by Congress be uniform throughout the United States did not apply to Puerto Rico); *Torres v. Puerto Rico*, 442 U.S. 465, 471 (1979) (search and seizure provision of either the Fourth or the Fourteenth Amendment applies); *Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 599-601 (1976) (Equal Protection Clause of either the Fifth or the Fourteenth Amendment applies); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668-69 n.5 (1974) (Due Process Clause of either the Fifth or the Fourteenth Amendment applies).

Territories and possessions, owned by the federal government, should necessarily be subject to suit in the federal courts, particularly when there is no statement of Congressional intent to the contrary.

The Eleventh Amendment, for these reasons, is not applicable to Puerto Rico. At a minimum, this Court should hold that no Congressional intent requires that an Eleventh Amendment claim made by a territory or possession be given the extraordinary interlocutory review sought here.

CONCLUSION

The decision of the First Circuit is correct and should be affirmed.

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Respectfully submitted,

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